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No. 89-46

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

PATRICIA M. WOOD, et al.,

Petitioners,

v.

GENERAL MOTORS CORPORATION,

Respondent.

PETITIONERS' SUPPLEMENTAL BRIEF IN RESPONSE TO BRIEF OF THE UNITED STATES AS AMICUS CURIAE

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INTRODUCTION

The Solicitor General agrees that the First Circuit's decision is wrong, that General Motors is wrong, that plaintiffs' claims are not preempted, and that, under the law, plaintiffs are entitled to their day in court. In addition, the Solicitor General plainly agrees that this case involves an important federal question.

Nevertheless, the Solicitor General recommends that certiorari be denied because the "disagreement" among the lower courts is "not so severe", *Brief of United States as Amicus Curiae* ("S.G.Br.") at 17, and because this case does not involve a passenger car manufactured after 1986. While there are currently three other cases pending before this Court raising similar issues, *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. pending*, No. 89-592; *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. pending*, No. 89-279; *Meier v. Nissan Motor Co.*, 212 Cal. App. 3d 980, 261 Cal. Rptr. 80 (Ct. App. 1989), *cert. pending*, No. 89-940, the Solicitor General does not suggest that this Court review any of those

cases either. Instead, the Solicitor General urges this Court to wait — leaving the common law of thirteen states and Puerto Rico preempted and hundreds of design defect victims remediless, directly contrary to what the Solicitor General concedes to be the law.

We understand the Solicitor General's desire to have this Court consider his argument that the 1984 version of Standard 208 impliedly preempts a limited number of cases. We do not believe, however, that Congress's intent should be flouted, State law improperly preempted, the lower courts left without guidance, and injured consumers left without remedies while this Court waits for the auto manufacturers to permit the Solicitor General's "ideal" case to work its way through the courts. As will be discussed further below, the auto manufacturers have already paid substantial sums to settle two cases in order to avoid a definitive split in the circuits. They can be expected to do the same in the future. This Court should not wait; it should grant certiorari now.

THIS CASE PRESENTS AN IMPORTANT FEDERAL QUESTION.

If there is one thing that the Solicitor General's brief makes clear, it is that this case presents an important federal question. The Solicitor General agrees with us that the decision below misinterprets Congress's intent and improperly preempts state common law claims for at least three reasons.

First, while General Motors contends that "the First Circuit's view of the state of design-defect litigation in 1966 was not the basis of its resolution of the preemption issue," GM's Brief at 24, the Solicitor General agrees with us that this was precisely the basis for the First Circuit's interpretation and that the First Circuit's interpretation is dangerously mistaken. According to the Solicitor General, 15 U.S.C. § 1397(c) "preserves

'any liability under common law' and therefore encompasses any tort theory, old or new." *Id.* at 10. There is no basis for the First Circuit's creation of a "design defect exception" to 15 U.S.C. § 1397(c).

Second, the Solicitor General agrees with us that the plain language of 15 U.S.C. § 1397(c) precludes a finding that the Safety Act preempts *any* common law claim. The courts, he states, "can order a manufacturer to compensate accident victims for injuries caused by a defectively designed vehicle, even if the vehicle met all federal performance standards and even if such liability induces the manufacturer to redesign some or all of its cars. Whatever tension this creates is one that Congress decided to tolerate." *Id.* For this reason, the Solicitor General unequivocally rejects the conclusions of the First Circuit, the Tenth Circuit, the Eleventh Circuit, and intermediate appellate courts in California, Minnesota, and New York, and agrees with us that 15 U.S.C. § 1392(d) "does not expressly or impliedly preempt design defect tort actions based on the claim that a vehicle was defective simply because it did not contain an airbag." *Id.* at 7.

Third, while the Solicitor General believes that the 1984 version of Standard 208 has an implied preemptive effect independent of the Safety Act, he believes that it only preempts a limited subset of cases claiming that an automobile should have had a *specific type* of passive restraint. *Id.* The Solicitor General agrees with us that cases brought on the theory that the automobile should have had *some type* of passive restraint — *either* an airbag *or* an automatic seatbelt — are not preempted. *See id.* That is, of course, the theory on which this case (and the other pending cases) is based. *See id.* at 5 n. 8.

For all of these reasons, the Solicitor General agrees with us that the decision below (like the decisions in the other pending cases) improperly preempts state common law and leaves victims without a remedy, in direct contravention of Congress's

intent. That being so, certiorari should be granted because of the important federal question presented by this case.

THIS COURT SHOULD NOT WAIT FOR AN EVEN GREATER CONFLICT BELOW.

While the Solicitor General agrees that our claims are not preempted, he nevertheless urges this Court to deny certiorari until a more definitive conflict develops in the lower courts. There are five reasons why this Court should not follow that course of action.

First, as we demonstrated in our petition at 9-13 and our reply brief at 3-4, there is already a direct and stark conflict between the decision below and the decisions of eight federal circuit courts and five state courts of last resort. The Solicitor General attempts to distinguish those cases on the grounds that they involved the question of whether compliance with federal standards constituted an affirmative defense, rather than whether federal standards preempted a claim, and that they did not involve compliance with Standard 208. S.G.Br. at 17 n.17. These are truly distinctions without a difference. The decision below turned on the conclusion that 15 U.S.C. § 1397(c) was not intended to preserve design defect claims — a conclusion with which the cases we cited all disagree.

Second, the Solicitor General seriously understates the extent of the conflict that exists between the lower courts in cases involving airbags. As noted in our reply brief at 5-6, even those cases finding preemption disagree strongly with the decision below, *see, e.g., Taylor, supra*, 875 F.2d at 825, as do cases ultimately decided on state law grounds. *See, e.g., Schwartz v. Volvo North America Corporation*, ___ So.2d ___, slip op. at 19-21, 29-36 (Ala. July 28, 1989) (Hornsby, C.J., concurring and dissenting in part). Moreover, since our reply brief was filed, the Superior Court of Pennsylvania has unanimously held

that common law claims involving airbags simply are not preempted. *Gingold v. Audi-NSU-Auto Union, A.G.*, 567 A.2d 312 (Pa. Super. 1989). The Solicitor General acknowledges this decision, but says that the "disagreement...is not so severe that review is warranted at this time." S.G.Br. at 17. Reading the decision, it is hard to imagine how the disagreement could be more severe.

Third, it is extremely unlikely that the auto manufacturers will permit any federal circuit court or state court of last resort to decide a case involving airbags if the manufacturers anticipate an unfavorable result, and it is even less likely that they will permit any such result to reach this Court. While our petition has been pending, General Motors has paid substantial sums of money to settle airbag cases pending before the District of Columbia and Seventh Circuits, after learning the composition of the panel in each case. *Heftel v. General Motors Corp.*, No. 89-7036 (D.C.Cir.); *Ritt v. General Motors Corp.*, No. 88-1822 (7th Cir.). The counsel for the plaintiff in *Gingold*, the Pennsylvania case that found no preemption, has similarly informed us that Audi has recently expressed a strong interest in settling that case.

Fourth, there is simply no need for additional courts to address the issue before this Court resolves it. There has been enough "percolation" in the lower courts; the arguments pro and con have been adequately and fully developed. Over a hundred similar cases are currently pending in federal and state courts throughout the country. Appeals are underway in at least one circuit and two intermediate state appellate courts. It would serve no useful purpose and waste precious judicial and legal resources to wait for an even more concrete conflict to develop.

Fifth, to wait for an even greater conflict would be to leave the petitioners and hundreds of other design defect victims in thirteen states and Puerto Rico without a remedy. That might be acceptable if Congress truly had intended it, but the Solicitor

General concedes that Congress intended these victims to have their day in court. They can obtain it only if this Court grants certiorari now.[1]

THIS COURT SHOULD NOT WAIT FOR A CASE INVOLVING A PASSENGER CAR MANUFACTURED AFTER 1986.

The Solicitor General also suggests that the Court deny certiorari because this case does not involve a passenger car manufactured after 1986 and does not require resolution of the one issue on which we and the Solicitor General disagree: whether the 1984 version of Standard 208 impliedly preempts common law claims that cars were defectively designed *solely* because they lacked airbags. This argument, too, is flawed for five reasons.

First, no case presents all issues. This Court should not wait for a case raising even more issues when the question presented by this case is such an important one and the Solicitor General agrees that the court below has decided it incorrectly.

Second, under the Solicitor General's approach, this Court would work backward — it would start with the most recent model years and then accept cases involving vehicles manufactured earlier. That makes no sense, particularly since the courts will be faced with cases involving earlier model cars first and even the Solicitor General declines to take a position on the impact of his implied preemption theory on such cases. *See* S.G.Br. at 17-18.

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[1] The Solicitor General suggests that, on remand, petitioners may still be able to claim that the vehicle in this case was defectively designed, since the First Circuit purported to pass on an airbag-only claim, not on claims based on the absence of passive restraints generally. S.G.Br. at 19 n. 20. As the Solicitor General concedes elsewhere, however, the First Circuit's decision did not purport to turn on the airbag-only issue; it applied generally to all design defect claims. *Id.* at 9-10.

Third, even if a case involving a passenger car manufactured after 1986 did reach this Court, there is no assurance that it would require resolution of the Solicitor General's implied preemption theory. Under that theory, post-1986 common law claims are not preempted unless they are based on the proposition that the car was defective specifically because it lacked airbags. If the plaintiffs alleged, as we do here, that the car was defectively designed because it lacked *some form* of passive restraint, the Solicitor General's theory would not be implicated.

Fourth, if this Court were to deny certiorari, impliedly because it was awaiting the Solicitor General's "ideal" case, it is exceedingly unlikely that the manufacturers would permit such a case to reach this Court, for the reasons we have already mentioned. This problem would be exacerbated by the fact that such cases would be less and less likely to arise, as the manufacturers are moving closer and closer to all-airbag fleets.

Fifth, the issues that the Solicitor General wants this Court to consider, like the effect of the 1984 version of Standard 208 on cars manufactured between 1984 and 1986, are only relevant if the Solicitor General's implied preemption theory is adopted. And the simple truth is that the Solicitor General's theory is an extraordinary attempt to expand the power of the federal agencies at the sake of the States.

To understand why this is so, it is critical to recognize what the Solicitor General is and is not arguing. The Solicitor General is not arguing that the Safety Act expressly or impliedly preempts any common law claims. He concedes that it does not. S.G.Br. at 9-10, 14-15. The Solicitor General is not arguing that the 1984 version of Standard 208 expressly preempts any common law claims. A cursory review of the Standard would establish that it does not. *See* 49 C.F.R. § 571.208. The Solicitor General is not arguing that the 1984 version of Standard 208 impliedly preempts common law claims because it occupies the field or because it is impossible to comply with

both federal and state law. Indeed, he concedes, as he must, that this case does not pose that type of conflict. S.G.Br. at 11. Instead, the Solicitor General maintains that, despite all of the foregoing, the 1984 version of Standard 208 silently and impliedly preempts an entire category of state common law claims – including possibly common law claims concerning automobiles manufactured long before the 1984 version was promulgated – simply because, in promulgating it, the Secretary decided that the possibility of unjustified consumer resistance to airbags would make it unwise for the *federal government* to *order* the manufacturers to install airbags in all cars.

We seriously question whether the litigation of state common law claims would, in fact, undermine the Secretary's policy decision. For example, as Chrysler's recent advertisements reflect, consumers would undoubtedly react far differently if airbags were *voluntarily* installed by the manufacturers in response to marketplace *incentives* than they would if airbags were *involuntarily* installed by the manufacturers in response to a government *order*. Leaving that aside, however, the central premise underlying the Solicitor General's argument is that the Secretary of Transportation has the inherent power to impliedly preempt an entire area of state tort law simply because it conflicts with one of her policies. But the "sole task" of preemption analysis "is to ascertain the intent of Congress," *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 272, 280 (1988), and, here, the Solicitor General concedes that Congress *did not intend* federal motor vehicle safety standards to preempt common law claims. S.G.Br. at 9-10, 14-15. To argue that the Secretary nevertheless has the power to preempt such claims – much less to silently preempt them through a policy decision on an arguably related matter – is to urge an incredible expansion of federal regulatory power.

That being so, it would be particularly ill-advised to wait for a case involving a car manufactured after 1986 before considering the issues presented in this case. The Solicitor General, interested in expanding the federal government's power, may see "no pressing need" for review at this time, S.G.Br. at 20, but the need could hardly be greater for the States, the victims, and the lower federal and state courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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